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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Petitioner,

v.

REIMER & KOGER, ASSOCIATES, INC., et al.,
Respondents,

v.

RESOLUTION TRUST CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS E. DEACY, JR.
Counsel of Record
DEACY AND DEACY
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
(816) 421-4000

LEONARD M. RING
LEONARD M. RING AND ASSOCIATES, P.C.
111 West Washington Street
Suite 1333
Chicago, Illinois 60602
(312) 332-1765

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTIONS PRESENTED

1. Whether a federal court can assume subject matter jurisdiction over an action sounding in common law fraud and violations of state statutory security laws, where the only asserted basis for jurisdiction is the defendants' third party action against the Resolution Trust Corporation ("RTC"), one count of which seeks indemnity from the RTC as receiver of a failed savings and loan despite the absence of assets in that estate, and the other count, against the RTC directly, seeks recovery for the RTC's negligent mismanagement of the savings and loan five years after the fraud occurred.

2. Whether an order of a Kansas state court severing a third party action against the RTC from a pending case violated the Supremacy Clause, where there was no nexus between the third party action and plaintiff's claims against defendants and it was obvious that the third party action was frivolous and prudentially moot, designed solely to create federal jurisdiction.

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PETITION FOR WRIT OF CERTIORARI

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[1] The following is a list of all parties to the proceedings in the United States Court of Appeals for the Eighth Circuit:

Kansas Public Employees Retirement System, an agency of the State of Kansas; Reimer & Koger Associates, Inc., a Kansas Corporation; Ronald Reimer, an individual; Kenneth H. Koger, an individual; Clifford W. Shinski, an individual; Brent Messick, an individual; Robert Crew, an individual; Frank Morgan, an individual; Sherman Dreiseszun, an individual; Leland Gerhart, an individual; I.I. Ozar, an individual; Raymond Gifford, an individual; Harry S. Jonas, an individual; Ralph E. Kiene, an individual; Randall M. Nay, an individual; Frank Sebree, an individual; Tony Salazar, an individual; Phillip M. Pistilli, an individual; Michael Russell, an individual; Gage & Tucker, a law partnership; Peat, Marwick Mitchell & Co., an accountancy firm; KPMG Peat Marwick, an accountancy firm; and Robert Spence, an individual.

Kansas Public Employees Retirement System ("KPERS") respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. KPERS seeks the reversal of the order of the United States District Court for the Western District of Missouri denying petitioner's motion to remand the underlying primary litigation to the Shawnee County, Kansas, district court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the denial of petitioner's Motion to Remand the underlying litigation to the Kansas state court, is reported at 4 F.3d 614 (8th Cir. 1993) and set forth in the Appendix, *infra*, at App. 3 through App. 18. The court's order denying petitioner's Petition for Rehearing with Suggestions for Rehearing En Banc is set forth in the Appendix, *infra*, at App. 19. The district court's Order Denying Motion To Remand And Certification Pursuant To 28 U.S.C. § 1292(b) is set forth in the Appendix *infra*, at App. 20 through App. 21.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the district court's denial of petitioner's Motion to Remand, was entered on September 2, 1993. That court's order denying petitioner's Petition for Rehearing with Suggestions for Rehearing En Banc was entered on October 12, 1993.

On December 22, 1993, the Honorable Harry A. Blackmun granted petitioner's Application for Extension of Time in Which to File Petition for Writ of Certiorari and allowed petitioner until February 9, 1994 in which to file

said Petition. A copy of that order is set forth in the Appendix, *infra*, at App. 22.

Petitioner invokes this court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution
Article VI, cl 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 1441a(l) Power to remove; jurisdiction.

> (1) In general. Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [Resolution Trust] Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.
>
> * * * *
>
> (3) Removal and remand. (A) In general. The Corporation, in any capacity and without bond or security, may remove any action, suit or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia,

or to the United States district court with jurisdiction over the principal place of business of any institution for which the Corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution. . . .

12 U.S.C. § 1821(i)(2)

The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution . . . shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities. . . .

12 C.F.R. § 545.121 Indemnification of directors, officers and employees.

A Federal savings association shall indemnify its directors, officers, and employees in accordance with the following requirements:

* * * *

(c) *Requirements.* Indemnification shall be made to such period under paragraph (b) of this section only if:

(1) Final judgment on the merits in his or her favor; or

(2) In case of:

(i) Settlement,

(ii) Final judgment against him or her, or

(iii) Final judgment in his or her favor, other than on the merits, if a majority of the disinterested directors of the savings association determine that he or she was acting in good faith within the scope of his

> or her employment or authority as he or she could reasonably have perceived it under the circumstances and for a purpose he or she could reasonably have believed under the circumstances was in the best interests of the savings association or its members.
>
> However, no indemnification shall be made unless the association gives the Office [of Thrift S pervision] at least 60 days' notice of its intention to make such indemnification. . . . No such indemnification shall be made if the Director of the Office advises the association in writing, within such notice period, of his or her objection thereto.
>
> * * * *
>
> (f) No savings association shall indemnify any person referred to in paragraph (b) of this section . . . other than in accordance with this section.

STATEMENT OF THE CASE

In June, 1991, Kansas Public Employees Retirement System (KPERS), an agency of the State of Kansas, brought suit in the Kansas state court against its investment manager to recover losses it incurred on its 1986 investment in Home Savings and Loan Association ("HSA") subordinated debentures. In December, 1991, KPERS amended its petition, adding, *inter alia*, the former officers and directors of HSA ("the Morgan defendants") as defendants. KPERS claimed that the Morgan defendants fraudulently induced it to invest in the HSA debentures, leading to the complete loss of KPERS' $65 million investment.

In March, 1991, the Resolution Trust Corporation ("RTC") was appointed receiver for HSA. The RTC ultimately liquidated HSA and disposed of all HSA's assets. Receipts from the sales were insufficient to pay the secured de-

positors in full. The amount of any shareholders' equity was "reduced to below zero."[2]

In October, 1992, after the state court had found KPERS' claims not to be derivative of those belonging to the RTC, the Morgan defendants filed a third party action against the RTC alleging it was guilty of mismanaging the association following the receivership in that it failed to realize maximum settlements on outstanding loans owned by HSA on liquidation of HSA's assets. In a separate, second count, the Morgan defendants charged that if a judgment were entered against them, they would be entitled to indemnity from HSA, under 12 C.F.R. § 545.121, and that the RTC assumed this liability to them as receiver, under 12 U.S.C. § 1821(d).

It was obvious, from the frivolous nature of the claims, that the sole object of joining the RTC was to create a vehicle for removal to federal court. KPERS responded to the joinder by moving, *ex parte*, to sever the third party action against the RTC from the action involving KPERS and the Morgan defendants. This left the RTC free to remove the third party action to the federal court. And it left KPERS' action against the Morgan defendants in the Kansas state court. At the time of the severance, the state court had jurisdiction over the combined actions.[3]

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[2] Suggestions of the HSA Defendants (And Third-Party Plaintiffs) in Opposition to the Resolution Trust Corporation's Motion to Dismiss Third-Party Petition, or in the Alternative, for Summary Judgment, at p. 3.

[3] Much was made by the district court and the Eighth Circuit of the fact that KPERS' motion was heard *ex parte*. Whether the proceeding was *ex parte* or with notice under Kansas state procedure is irrelevant to the issue of whether the state court judge had a right to enter the order or whether the order violated the Supremacy Clause. The intent of the parties on both sides was clear.

On October 13, 1992, pursuant to 12 U.S.C. § 1441a(l), the RTC filed a notice to remove the entire action to the United States District Court for the Western District of Missouri. On KPERS' Motion to Remand, the district court found that there was a potential basis for the Morgan defendants' claim for indemnity against the RTC as receiver of HSA, but certified the issue for interlocutory appeal. (App. 20-21)

On review, the Eighth Circuit stated, "[E]ven if we were to strike the second claim [indemnity] as legally frivolous in accordance with KPERS' arguments, the district court would still retain jurisdiction over the entire case as the negligent mismanagement claim [against the RTC] would remain." (App. 16)

The appeals court took note of KPERS' argument that there were no funds in the hands of the RTC as receiver of HSA to pay any judgment if one were recovered, and that all of HSA's assets had been sold and the association liquidated. It then distinguished the present case from two other Eighth Circuit cases and a similar case from the Fifth Circuit, all of which held that where there were no assets in the receivership the claims were prudentially moot. It reasoned that those cases did not contain an alternative claim against the RTC, directly. (App. 16-17)

REASONS FOR GRANTING THE WRIT

I.

THE THIRD PARTY ACTION DID NOT CREATE FEDERAL SUBJECT MATTER JURISDICTION WHERE THE CLAIMS WERE FRIVOLOUS AND PRUDENTIALLY MOOT.

In *Bell v. Hood*, 327 U.S. 678, 678-83 (1945), the Supreme Court reiterated that "a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." The Eighth Circuit paid lip service to *Bell* but ignored it.

A. *The Indemnity Claim Is Prudentially Moot And Frivolous.*

1. There Are No Assets To Satisfy A Judgment For The Directors Even If One Were Somehow Granted.

The assets of HSA have been liquidated and disbursed. Although KPERS was the first priority creditor, the Morgan defendants admitted in their pleadings that there were insufficient assets to pay in full the secured depositors. Under these circumstances, the Morgan defendants' claim for indemnity falls under the spell of *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). There the Supreme Court held:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

159 U.S. at 653. This statement was written for this case. See also *Muskrat v. United States*, 219 U.S. 346, 356-357,

55 L.Ed 246 (1911) (there must be a meaningful controversy for the court to take notice of, which could result in a meaningful resolution of the dispute between the parties).

The Eighth Circuit followed the teaching of *Mills* in *Adams v. RTC*, 927 F.2d 348 (8th Cir.) *cert. denied*, ____ U.S. ____, 112 S.Ct. 66, 116 L.Ed.2d 41 (1991). The plaintiff in that case brought suit against the RTC as receiver of a failed savings and loan, seeking, *inter alia*, damages for common law fraud. The district court entered judgment for defendant because a judgment for plaintiff could not be satisfied and the case was therefore moot. The Eighth Circuit affirmed:

> We agree with the district court's decision declaring the claim moot on prudential grounds because the Bank's Board's determination that MWF's [Midwest Federal Savings and Loan Association's] assets were insufficient to meet the claims of general creditors meant that the court could not grant subordinate debt holder Adams any effectual relief.
>
> * * * *
>
> The import of [the Bank Board's determination of worthlessness] is that FSLIC, as receiver for MWF, will *never* have any assets with which to satisfy a fraud judgment. Under these circumstances, we follow the axiomatic principle that when 'it [is] impossible for [a] court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment.' *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). (Emphasis in original.)

927 F.2d at 354-55.

Adams is remarkably similar to the case at bar. Here, as in *Adams*, the Morgan defendants cannot possibly recover damages from HSA. HSA was declared insolvent and has been liquidated. As officers and directors of HSA,

the Morgan defendants represent a lower class of creditors than the secured depositors and the subordinated debenture holder in *Adams*. Accordingly, the Morgan defendants cannot show any better possibility of payment than in *Adams*.

Moreover, 12 U.S.C. § 1821(i)(2) prohibits any recovery against the RTC's assets which would fall on the taxpayers. Consequently, the Morgan defendants cannot recover any money whatever on their third party claim. It is prudentially moot and frivolous. *See also, Resolution Trust Corporation v. Greenwood*, 798 F.Supp. 1391 (D.Minn. 1992). (Following *Adams*, the district court for the District of Minnesota struck an affirmative defense for indemnity brought by the directors and officers of a failed savings and loan association against the RTC on the ground of prudential mootness.).

The Eighth Circuit likewise adhered to *Mills* in *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990), *vacated on other grounds*, 943 F.2d 860 (1991). There the court found that when there were no assets to satisfy a judgment, a claim was wholly specious and insubstantial and could not form the basis for federal jurisdiction.

The Fifth Circuit reached the same result in *First Indiana Federal Savings Bank v. FDIC*, 964 F.2d 503 (5th Cir. 1992). In that case, First Indiana had asserted a claim against the FDIC to recover on unsecured obligations owed to it by United Savings Association of Texas, a failed thrift that had been liquidated by the FDIC. Upon liquidation, no assets were available to pay unsecured claims; the court held that under 12 U.S.C. § 1821(i)(2), First Indiana was barred from recovering damages from FDIC directly. The court explained:

> In enacting FIRREA, Congress unequivocally expressed its intent to limit the maximum liability of

> the FDIC to the amount the claimant would have received in a liquidation under federal priority regulations. In this instance, First Indiana would not have received anything had Old United been liquidated.
>
> Congressional policy requires that creditors of failed institutions look only to the assets of the institution for recovery of their losses, and not to the taxpayers. . . . Therefore the district court could not legally enter a judgment against FDIC in favor of First Indiana . . . .

964 F.2d at 507. Because First Indiana could not collect any judgment, the court found a trial would be a "completely hollow act," resulting in a useless expenditure of time and resource, by the parties and the court. Consequently, it upheld the district court's entry of judgment against First Indiana on grounds of prudential mootness. *Id.*

2. The Morgan Defendants Also Cannot Comply With The Provisions Of 12 C.F.R. § 545.121.

The indemnity claim was moot for a second reason. The provisions of 12 C.F.R. § 545.121(c) require that the majority of the disinterested directors approve the indemnity award and that the Office of Thrift Supervision ("OTS") must receive notice of the award and have no objection to it. These requirements cannot be fulfilled here because HSA is gone, and its former directors, named defendants, are not "disinterested." The existence of the requirement for OTS acquiescence and the other procedural steps provided for in 12 C.F.R. § 545.121(c) corroborates that indemnity was meant to be available only to officers and directors of solvent institutions, with functioning boards of directors that operate under OTS supervision. The stat-

ute expressly provides this. 12 C.F.R. § 545.121(c)(2)(iii).[4] Moreover, 12 C.F.R. § 545.121(f) specifically provides: "No savings association shall indemnify any person referred to in paragraph (b) of this section . . . other than in accordance with this section."

While the Morgan defendants admitted that HSA's assets had been "reduced to below zero" they responded to the mootness claim below with the statement: "There is no record that the RTC . . . is judgment-proof."[5] The suggestion that RTC's general assets could be available to pay any potential indemnification judgment is contrary to law. 12 U.S.C. § 1821(i)(2) prevents indemnity out of public funds:

> The maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or the insured depository institution . . . shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities. . . .[6]

The conflicting and confusing decision of the Eighth Circuit, if left to stand, will either mislead litigants into believing that such a cause of action exists, or equally intolerable, that alleging a sham cause of action is sufficient, in itself, to create federal jurisdiction. Under this second

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[4] The RTC raised this exact argument in *Resolution Trust Corporation v. Greenwood*, 798 F.Supp. 1391 (D.Minn. 1992), where, as noted *supra* at p. 10, the affirmative claim for indemnity was stricken.

[5] HSA Defendants' Response to KPERS Petition for Permission to Appeal at p. 9.

[6] Although the RTC was not in existence when 12 U.S.C. § 1821 was first enacted, Congress has since provided that the RTC shall have the same power and authority as FDIC (the "Corporation" referred to in § 1821); and 12 U.S.C. § 1441a(b)(4)(A) expressly provides that 12 U.S.C. § 1821 shall apply to the RTC.

scenario, even if the third party action would properly be dismissed by the federal court, the primary case would remain there.[7] In either case, this is not the way the federal courts should operate.

B. *No Cause Of Action Exists For The RTC's Negligent Mismanagement Of HSA.*

Apparently recognizing that the indemnity count, which the district court used for its finding of "non-frivolousness" stood on soft clay, the Eighth Circuit based its finding of jurisdiction on the negligent mismanagement claim: "[E]ven if we were to strike the second [indemnity] claim as legally frivolous in accordance with KPERS' arguments, the district court would still retain jurisdiction over the entire case as the negligent mismanagement claim [against RTC] would remain." This statement is equally flawed. Actions against receivers of failed banking institutions for negligent mismanagement are barred by the discretionary function exception of the Federal Tort Claims Act. *United States v. Gaubert*, ___ U.S. ___, 111 S.Ct. 1267, 113 L. Ed.2d 335 (1991). Therefore, the mismanagement claim on which the Eighth Circuit ultimately fastened its decision, is in conflict with a decision of this court.

The analytical underpinnings of such a ruling were best articulated by the district court in *FSLIC v. Burdette*, 718

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[7] This is what the Eight Circuit opinion suggests:

> [T]he Home Savings directors have asserted a negligent mismanagement claim directly against the RTC, and as we stated earlier, whether the district court erred by concluding that the indemnification claim was not frivolous is not of import regarding removal jurisdiction as the mismanagement claim would survive a decision to strike and the court would retain jurisdiction. (App. 17)

F.Supp. 649 (E.D.Tenn. 1989). There, a receiver brought an action against the directors of a failed savings association, and the directors asserted the affirmative defense of failure to mitigate damages. The court explained:

> In cases of the failure of a savings institution, it is important to the public that the receiver rapidly and efficiently convert the assets of that institution to cash to repay the losses incurred by the insurance fund and the depositors for deposits not covered. Suits by the FSLIC as a receiver to recover assets, or to recover damages for wrongdoing, should not be encumbered by an examination in court of the correctness of any specific act of the FSLIC in its receivership. The rule that there is no duty owed to the institution or wrongdoers by the FSLIC/Receiver is simply a means of expressing the broad public policy that the banking laws creating the FSLIC and prescribing its duties are directed to the public good, and that every separate act of the FSLIC as a receiver in collecting assets is not open to second guessing in actions to recover damages from *wrongdoing directors and officers*. . . . [A] director or officer of a failed savings and loan accused of wrongdoing should not be entitled, and should not be surprised by an inability, to examine the conduct of a receiver of a failed institution in an attempt to reduce the recovery of the receiver in subsequent civil actions by the receiver.

Id. at 663-64, quoted approvingly in *Resolution Trust Corp. v. Kerr*, 804 F.Supp. 1091, 1099-1100 (W.D. Ark. 1992). See also *First State Bank of Hudson County v. United States*, 599 F.2d 558, 561-566 (3rd Cir. 1979); *Harmsen v. Smith*, 586 F.2d 156, 157 (9th Cir. 1978).

It is clear beyond cavil that the Eighth Circuit's holding, that a direct action against the RTC for negligent mismanagement of a failed savings and loan creates a valid cause of action, is wrong. The negligent mismanagement

claim does not state a valid cause of action against the RTC. It therefore, does not and cannot create subject matter jurisdiction.

C. *There Is No Case Or Controversy.*

Under Article III, § 2 of the United States Constitution, federal jurisdiction was improper because the third party claim did not present a justiciable "case or controversy." To satisfy the "case or controversy" test, the claims must involve valid enforceable rights. There must be a meaningful controversy of which the court should take notice. This could result in a meaningful resolution of the dispute between the parties. *Muskrat v. United States*, 219 U.S. 346, 356-357, 55 L.Ed. 246 (1911). This is not the case here. The Morgan defendants cannot demonstrate that they have a personal stake in the outcome, such that the relief requested, if granted, would have real significance.

As discussed *supra*, their indemnity claim is barred as being moot. *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895). And their mismanagement claim is likewise barred by the authority of public policy expressed by this court. *United States v. Gaubert*, ___ U.S. ___, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). Thus, there is no pending meaningful controversy. The Morgan defendants have no personal stake that could be affected by pursuing this case to judgment. And the RTC cannot be allowed to satisfy any judgment out of its own assets. It is a mock proceeding. See, e.g. *S. v. D.*, 410 U.S. 614, 616-617, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1973) (The mother of an illegitimate child could not challenge a state statute limiting prosecution for non-support, where prosecution would not result in support, but only in the incarceration of the father).

II.

THE SUPREMACY CLAUSE WAS NOT VIOLATED IN THIS CASE WHEN THE STATE COURT SEVERED AN UNRELATED, FRIVOLOUS AND MOOT THIRD PARTY ACTION BROUGHT BY THE MORGAN DEFENDANTS AGAINST THE RTC, FROM THE PRIMARY CASE INVOLVING KPERS AND THE MORGAN DEFENDANTS.

Congress did not authorize the RTC, in 12 U.S.C. § 1441a(l), to remove a pending action from state court to federal court, on the basis of a third party action filed against the RTC that is barred by federal public policy or moot. This would not satisfy the case or controversy requirement of Article III of the Constitution.[8] In this case, as we have detailed, *supra*, the two-count, third party complaint showed in its face that the negligent mismanagement count is barred and the indemnity claim is moot. Under these facts, the state court did not violate the Supremacy Clause by severing the third party complaint from the primary action.

Any other result would allow defendants to a civil suit to join the RTC, or other federal agency, no matter how detached, to gain an avenue for removal of a state case to federal court. Turning the federal judiciary into a repository of meaningless, farcical claims, for the sole and

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[8] While the Eighth Circuit cites *Nolan v. The Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990) as precedent for the holding that the RTC had the right to remove the entire litigation, we submit *Nolan* is not directly on point. *Nolan* did not hold that 28 U.S.C. § 1441(d) granted a foreign state the right to remove an entire action, not just the claims against it, regardless of severance (App. 11-14). In actuality, *Nolan* contained no such holding; the *Nolan* court expressly found that there was no "severance" involved in the case before it because Article 1038 of the Louisiana Code of Civil Procedure provided only for "separate trials" rather than "severance." See, *Nolan, supra*, 919 F.2d at 1067.

obvious purpose of changing venue from state to federal courts demeans the federal system. Neither the constitution nor the RTC removal statute, 12 U.S.C. § 1441a(l), allows it.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner, Kansas Public Retirement System, respectfully prays that its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted and that it direct the United States District Court for the Western District of Missouri, to grant petitioner's Motion to Remand.

Respectfully submitted,

THOMAS E. DEACY, JR.
Counsel of Record
DEACY AND DEACY
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
(816) 421-4000

LEONARD M. RING*
LEONARD M. RING AND ASSOCIATES, P.C.
111 West Washington Street
Suite 1333
Chicago, Illinois 60602
(312) 332-1765

Attorneys for Petitioner

* Mr. Ring, the principal author of this petition, passed away unexpectedly on February 4, 1994.

APPENDIX

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(Letterhead Of)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

September 2, 1993

Mr. Thomas E. Deacy Jr.
DEACY & DEACY
1000 Bryant Building
1102 Grand Avenue
Kansas City, MO 64106

Re: 93-1794WMKC KS Public Employees
vs. Reimer & Koger

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion was also entered today.

* * * * *

Sincerely,

/s/ Michael E. Gans
Michael E. Gans
Clerk of Court

mel

Enclosure(s)

cc: Leonard M. Ring
Epaminondas Eddie Manelis
Spencer J. Brown
Phillip B. Grubaugh
Gregory F. Maher
Alice G. Amick
Rodney J. Hoffman
Richard F. Adams
Kathleen A. Clark Hardee
Thomas H. Stahl
James E. Kelley Jr.
Charles Walter German
Brant Mitchell Laue
Robert M. Thompson
Robert Wilson McKinley
James H. McLarney
Reed O. Gentry
Laurence M. Jarvis
William L. Turner
Paul Scott Kelly Jr.
Bernard Joseph Rhodes
Jerome W. Pope
Kurt L. Schultz
Dan K. Webb
Thomas G. Griffin
James W. Tippin
Carmen Fennoy Moody
David Allan Vorbeck
Timothy P. Collins
Elizabeth Jolliffe Basten
Nancy A. Temple
Lindsay P. Reichmann
Jeffrey R. Tone
William F. Lloyd
Stephen W. Cavanaugh
Robert F. Connor

District Court/Agency Case Number(s): 92-0922-CV-W-9

App. 3

[Filed September 2, 1993]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1794

Kansas Public Employees Retirement System,

Plaintiff-Appellant,

v.

Reimer & Koger Associates, Inc., a Kansas Corporation; Ronald Reimer, an individual; Kenneth H. Koger, an individual; Clifford W. Shinski, an individual; Brent Messick, an individual; Robert Crew, an individual; Frank Morgan, an individual; Sherman Dreiseszun, an individual; Leland Gerhart, an individual; I. I. Ozar, an individual; Raymond Gifford, an individual; Harry S. Jonas, an individual; Ralph F. Kiene, an individual; Randall M. Nay, an individual; Frank Sebree, an individual; Tony Salazar, an individual; Philip Pistilli, an individual; Michael K. Russell, an individual; Gage & Tucker, a law partnership; Peat, Marwick, Mitchell & Co., an accountancy firm; KPMG Peat Marwick, an accountancy firm; Robert Spence, an individual;

Defendants-Appellees.

Frank Morgan; Sherman Dreiseszun; Leland Gerhart; I. I. Ozar; Raymond Gifford; Ralph E. Kiene; Randall M. Nay; Tony Salazar; Philip Pistilli,

Third-Party Plaintiff-Appellees,

v.

Resolution Trust Corporation,

Third-Party Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: June 14, 1993

Filed: September 2, 1993

Before McMILLIAN, JOHN R. GIBSON, and HANSEN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The Kansas Public Employees Retirement System appeals from a district court[1] order denying its motion to remand this action to a Shawnee County, Kansas, district court. KPERS argues that because the state court severed the original claims from the third-party claims before the third-party defendant, the Resolution Trust Corporation, removed the case to federal court, only the third-party claims could be removed. KPERS also argues that the district court erred in holding that the third-party plaintiffs' claim for indemnification against the RTC was not frivolous under 12 C.F.R. § 545.121 (1992). We affirm.

On June 5, 1991, KPERS filed suit in the District Court of Shawnee County, Kansas, to recover damages resulting from the purchase of Home Savings Association debentures for the Kansas Employees' Retirement Fund. KPERS named Michael K. Russell (its former board chairman), Reimer & Koger Associates (its former investment advisor), Peat, Marwick, & Mitchell Company (its former accounting firm), Gage & Tucker (its former law firm), and

---

[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

the Home Savings Association's officers and directors[2] as defendants. Along with various allegations of fraud, breach of fiduciary duty, professional negligence, and gross negligence, KPERS claimed that the Home Savings directors violated the Kansas Securities Act, Kan. Stat. Ann. § 17-1268 (1983). In response, the Home Savings directors moved to dismiss KPERS' claims as derivative of claims that belonged solely to the RTC, and argued that the RTC was a necessary party.

Shortly thereafter, the RTC moved for leave to intervene in order to remove the action to federal court, where the RTC would attempt to have the case dismissed. On August 21, 1992, the Kansas district court denied the Home Savings directors' motion to dismiss and held that KPERS' claims were nonderivative. The Kansas court never ruled on the RTC's motion requesting leave to intervene.

On October 2, 1992, the Home Savings directors filed a third-party petition against the RTC, claiming negligent mismanagement of Home Savings, which caused a loss of funds that could have been used to repay part of the KPERS investments, and seeking indemnification under 12 C.F.R. § 545.121. On October 8, 1992, at approximately 4:00 p.m., KPERS' counsel contacted the Shawnee County district court clerk to discuss the filing of a motion to strike the third-party claims or sever them from the original claims. The clerk advised the lawyers that the office would remain open after the normal 5:00 p.m. closing to permit the filing of pleadings. KPERS' counsel also con-

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[2] Frank Morgan, Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Ralph E. Kiene, Randall M. Nay, Tony Salazar, and Philip Pistilli.

tacted the chambers of the district judge handling the case, stating that KPERS "desired to present [a] severance motion to the . . . court for *ex parte* consideration that day." Opposing counsel were not notified.

At 5:26 p.m., KPERS' counsel appeared ex parte before the Kansas district judge to present its motion to strike the third-party petition or, alternatively, sever the third-party claims from the original lawsuit. The Kansas district judge stated:

> The Court is familiar with the history of this case, [and] feels that under the circumstances the addition of the Resolution Trust Corporation . . . by the third-party petition would subject this case to removal under the federal statutes . . . . [T]he Court [does] not feel that . . . to maintain [the third-party claims] in the same case [as the principal claims] and subjecting [the entire] case to removal would be in the best interests of the advancement of the princip[al] case. . . . I . . . sign ex parte the order to sever and direct . . . that the third party claim be severed and filed . . . as a separate case entirely from the previous [case]. . . . [T]he Court considers this matter on an emergency basis.

The judge also provided that any aggrieved party could file a motion for reconsideration and the court would consider such motions along with KPERS' motion to dismiss the third-party claims.

None of the parties filed a motion for reconsideration. Instead, five days after the Kansas court entered the severance order, the RTC filed a notice of removal for the entire case—both the original and third-party claims. In response, KPERS asked the federal district court to remand the "original case" to the Kansas court because the RTC was no longer a party to that action. The district court held a hearing on KPERS' motion for remand, and

asked KPERS' counsel about the motivation behind the severance and whether the defendants' counsel had been called before the ex parte proceeding occurred:

> THE COURT: [T]here was time to call the clerk's office and make this arrangement, but there was not time to call any other lawyer and suggest, "Hey, you might want to get over here because we're going to present this to the judge."
>
> MR. DEACY: That's so, as I understand it, Your Honor.
>
> THE COURT: And there was an emergency.
>
> MR. DEACY: It was an emergency.
>
> THE COURT: What was the emergency?
>
> MR. DEACY: The emergency was that so long as the cases were one case, the RTC could remove it all.
>
> THE COURT: And they could—had that right under federal law to do so.
>
> MR. DEACY: They had the right under federal law so long as they were a party to the case.
>
> THE COURT: Right. And so the emergency was to do something quickly to prevent the RTC from removing the case?
>
> MR. DEACY: That's right, Your Honor.

KPERS' counsel also assured the district court that the Kansas judge severed the case specifically to prevent removal:

> THE COURT: And it stated that the reason the judge is doing this is to, in essence, to prevent the RTC from removing the case.
>
> MR. DEACY: No question about it.
>
> . . .
>
> THE COURT: . . . [T]he only reason the judge gave for entering the severance order on an emergen-

> cy basis was to prevent the RTC from removing the case, which everybody believed the RTC had the right to do at the instant before the judge signed this order.
>
> MR. DEACY: Before the severance, yes, Your Honor. That's right. . . .
>
> . . .
>
> THE COURT: . . . KPERS' position, as I understand it, is that but for the order that the judge entered, the case would have been removed by the RTC, KPERS and the judge did not want it removed by the RTC, and so this order was entered, . . . not severing the third party petition or complaint for a separate trial, but severing it into another case.
>
> MR. DEACY: That's true, Your Honor.

Ruling from the bench, the district court emphasized that the Kansas court's only stated reason for severing the action into two separate cases was to defeat the RTC's ability to exercise its right to remove the entire action to federal court. The district court determined that granting severance for the sole purpose of defeating a congressionally conferred right violated the Supremacy Clause, U.S. Const. art. VI, cl. 2. Thus, the court held that the severance order was void and the entire case could be removed to federal court. In addition, the court stated that it was not bound by state procedural maneuverings in determining whether it had subject matter jurisdiction. The court held that the RTC had the right to remove the entire case, even though it was a third-party defendant, and that a state court could not defeat that right by using a mere procedural maneuver—arbitrarily dividing one case into two separate cases. Finally, the court rejected KPERS' argument that the third-party claims were frivolous and thus not within the district court's subject matter jurisdiction. The court reasoned that because the

RTC, as receiver, was a successor of Home Savings, it could be liable for indemnification of the Home Savings directors under 12 C.F.R. § 545.121. The district court then certified the matter for interlocutory appeal.

I.

On appeal, KPERS argues that the district court erred in holding that the severance order was void for violation of the Supremacy Clause. More specifically, KPERS contends that the district court did not have the right to review the Kansas court's severance order in determining whether to remove the original and third-party actions; that the Kansas court's order effectively divided the cases, the RTC was no longer a party to the original action, and thus, the RTC had no congressionally conferred right to remove it; and that the severance order did not frustrate any congressional purpose, and any conflict that might have existed between the severance and the RTC's right to remove was illusory.

Whether a case is removable is a question of federal law to be decided by the federal courts. *See Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318, 329 (1914); *see also Terral v. Burke Constr. Co.*, 257 U.S. 529, 557-58 (1922); *Stoll v. Hawkeye Casualty Co.*, 185 F.2d 96, 99 (8th Cir. 1950). The district court therefore had jurisdiction to decide whether the RTC could remove the original and third-party actions under 12 U.S.C. § 1441a(1).[3] Likewise, we have jurisdiction to determine whether the

[3] The RTC removed the action to the United States District Court for the Western District of Missouri because Home Savings principal place of business was located in Kansas City, Missouri. *See* 12 U.S.C. § 1441a(1)(3)(A).

district court properly decided to allow removal, and we review the district court's decision de novo.

To determine whether the RTC could remove both the original and third-party claims, the district court had to examine the procedural status of the "cases" as of the date the RTC requested removal. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 540 (1939). In so doing, the district court had to decide whether the Kansas court's severance order created two separate and distinct cases and caused the RTC to be a named party to the third-party action, but a "stranger" to the original action. Thus, the district court did not review the Kansas court's order for "correctness" under Kansas law or in the sense that an appellate court might review a trial court. Instead, the district court examined the order as an integral part of its removal decision relating to both the original and third-party claims.[4] *See Harrison*, 232 U.S. at 329.

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act, giving the RTC the right to remove cases to federal court:

> The Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the Corporation has been appointed

[4] Although some of the appellees urge that the Kansas court's actions are void because they did not comply with Kansas law, we decline to discuss this issue as it takes us beyond the review necessary for determining whether removal is appropriate.

> conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution.

12 U.S.C. § 1441a(1)(3)(A) (Supp. III 1991). When the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC had the right to remove "the entire case" to federal court. *California v. Keating*, 986 F.2d 346, 348-49 (9th Cir. 1993) (emphasizing that the RTC could remove the entire action at any time); *see also In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1260 (11th Cir. 1992) (holding that a foreign state third-party defendant's removal under 28 U.S.C. § 1441(d) (1988) entitled it to remove the entire case, not just the third-party claims against it); *Nolan v. The Boeing Co.*, 919 F.2d 1058, 1066 (5th Cir. 1990) (concluding that when a foreign state third-party defendant removes under § 1441(d), "it removes not just the third-party claims but the main claims as well"), *cert. denied*, 111 S. Ct. 1587 (1991).

KPERS agrees with the analysis to this point. In fact, this is admittedly why KPERS went to the Kansas court to request severance on an "emergency" basis, and why the Kansas court granted the ex parte order. KPERS argues that once the Kansas court divided the case, the RTC was no longer a party to the original action and only had a right to remove the separate, third-party action. The appellees, on the other hand, contend that the Supremacy Clause renders the severance order void.

The Supremacy Clause provides that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus:

> when state law touches upon the area of federal statutes enacted pursuant to constitutional authority, "it is 'familiar doctrine' that the federal policy 'may not

> be set at naught, or its benefits denied' by the state law. This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power."

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 479-80 (1974) (citations omitted). In addition, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.' " *Howlett v. Rose*, 496 U.S. 356, 368 (1990). "An excuse that is inconsistent with or violates federal law," however, "is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.*

It is also well established that states cannot directly or indirectly prevent, defeat, or limit the free exercise of the right to remove. *Goldey v. Morning News*, 156 U.S. 518, 523 (1895) (stating that the state legislature and judiciary can neither defeat the congressionally conferred right to remove a case from state court to federal court, nor limit the effect of such removal); *see also Terral*, 257 U.S. at 532; *Harrison*, 232 U.S. at 328. Likewise, the federal courts should not condone a procedure intended to prevent removal when a party has the right to remove. *See Wecker v. National Enamelling & Stamping Co.*, 204 U.S. 176, 185-86 (1907); *see also Anderson v. Home Ins. Co.*, 724 F.2d 82, 83-84 (8th Cir. 1983) (joinder to deprive federal courts of jurisdiction is fraudulent and will not prevent removal).

Congress gave the RTC a broad right to remove any action, and until the Kansas court acted ex parte with the stated purpose of limiting the RTC's right to remove, the RTC could have removed the entire case to federal court. As KPERS' counsel admitted in his discussion with

the district court and in his brief before this court, the Kansas court intended to keep the original action in state court by preventing the RTC from exercising its federal right to remove it. On its face the Kansas court's order violates the Supremacy Clause. We conclude that the district court did not err in holding the severance order void.

Nevertheless, even if we assume the Kansas court effectively severed the action into two cases, that procedural maneuver did not divest the RTC of its interest in the original action. Under both the Kansas and Federal Rules of Civil Procedure, a "third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." *See* Kan. Stat. Ann. § 60-214 (1983); Fed. R. Civ. P. 14(a). Because a third-party defendant cannot relitigate the question of a third-party plaintiff's liability to the original plaintiff, this provision protects the third-party defendant against any prejudice that might result from the third-party plaintiff's failure to assert a particular defense against the original plaintiff. *See, e.g., United States v. Lumbermens Mut. Casualty Co.*, 917 F.2d 654, 658 n.5 (1st Cir. 1990) (allowing a third-party defendant that was not a "party" to the original action to raise on appeal claims of error based in the original action); *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 n.7 (3d Cir. 1972) (permitting the third-party defendant to take part in the trial and to examine and cross-examine witnesses as the rules of evidence permit); *F & D Property Co. v. Alkire*, 385 F.2d 97, 100 (10th Cir. 1967) (stating that "a third party defendant is in the lawsuit as an adverse a party to the same extent as the defendant and must act accordingly"); *Williams v. Keyes*, 125 F.2d 208, 209 (5th Cir.), *cert. denied*, 316 U.S. 699 (1942); 6 Charles A. Wright et al., Federal Practice & Procedure § 1457 (2d ed. 1990). The provision also reduces

the possibility of collusion between the plaintiff and the third-party plaintiff.[5] *See* Wright, *supra.*

In *Nolan*, the Fifth Circuit addressed a similar question regarding the removability of an action involving a foreign state that had been named as a third-party defendant. 919 F.2d at 1061. The state court in *Nolan* ordered severance of the third-party claims in an ex parte proceeding. *Id.* The third-party defendant removed "the entire case," the district court refused to remand, and the plaintiffs appealed. *Id.* The Fifth Circuit determined that 26 U.S.C. § 1441(d) granted a foreign state the right to remove an entire action, not just the claims against it, regardless of severance. *Id.* at 1065. The court found no significant difference between the authorization for removal of an entire action by a sovereign co-defendant, and removal of an entire action by a sovereign third-party defendant. *Id.* In fact, the court determined that the third-party's interests in removal may be more compelling because its liability is logically dependent on the liability of the defendant in the original action—to fully protect itself the third-party defendant may be called upon to assert defenses on behalf of the defendant. *Id.*

Thus, once the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC became inextricably involved in the entire action—both the original and third-party claims. Although both the Kansas and Federal Rules of Civil Procedure allow a court to sever the third-party claims from the original claims, such severance does not exclude the third-party defendant from

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[5] These same reasons answer KPERS' argument that the severance order did not conflict with the congressional objective of giving the RTC the right to remove.

participation in the original action nor deprive it of its ability to exercise its congressionally conferred right to remove the entire case to federal court. *See Nolan*, 919 F.2d at 1065.

II.

KPERS next argues that the district court erred in holding that the Home Savings directors' indemnification claim against the RTC is not frivolous.

In *Bell v. Hood*, 327 U.S. 678, 682-83 (1946), the Supreme Court stated:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a proper cause of action on which [the plaintiff] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. . . . [A] suit may sometimes be dismissed[, however,] for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

(citations omitted); *see also Hagans v. Lavine*, 415 U.S. 528, 536-37, 542-43 (1974).

As we stated earlier, the Home Savings directors' third-party petition against the RTC contains two counts. First, the directors claim that the RTC negligently mismanaged Home Savings after it took control. The directors also claim that if they are found liable in the original action with KPERS, they are entitled to indemnification from Home Savings under 12 C.F.R. § 545.121, and the RTC assumed this liability as a receiver under 12 U.S.C. § 1821(d) (1988). Thus, even if we were to strike the second claim as legally frivolous in accordance with KPERS' arguments, the district court would still retain jurisdiction over the entire case as the negligent mismanagement claim would remain.

KPERS relies on our decisions in *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990), and *Adams v. Resolution Trust Corp.*, 927 F.2d 348 (8th Cir.), *cert. denied*, 116 L.Ed.2d 41 (1991), as well as the Fifth Circuit's decision in *First Indiana Federal Savings Bank v. Federal Deposit Insurance Co.*, 964 F.2d 503 (5th Cir. 1992), to support its argument that even if the Home Savings defendants could prevail on their indemnification claim against the RTC as successor, there are no Home Savings assets with which the RTC could satisfy the judgment, and therefore, the claim is moot and frivolous.[6] The complaints in *Condor*, *Adams*, and *First Indiana Savings*, however, did not contain an alternative, direct claim against the defendant as this third-party complaint con-

[6] The Home Savings defendants point out that the "frivolousness test" may not apply at all given the RTC's special removal statute, which would allow the RTC access to the federal courts regardless of the nature of the claim. We need not answer this question, however, because we have determined that the court retains jurisdiction over the entire action regardless of whether the indemnification claim is frivolous.

tains. The plaintiffs in *Condor, Adams,* and *First Indiana Savings* had only indirect claims against a receiver or successor—claims derived from the original institution's liability to the plaintiffs. Striking the indirect claims in those cases disposed of the entire matter. In contrast, the Home Savings directors have asserted a negligent mismanagement claim directly against the RTC, and as we stated earlier, whether the district court erred by concluding that the indemnification claim was not frivolous is not of import regarding removal jurisdiction as the mismanagement claim would survive a decision to strike and the court would retain jurisdiction. Under either count of the third-party claim, the RTC may participate in the original case and assert defenses on behalf of the Home Savings directors, contending that the directors were not liable for the KPERS loss.[7] Thus, we need not consider at length the arguments regarding the indemnification claim.

Section 545.121 requires that a federal savings association indemnify its directors, officers, and employees for liability and costs they may incur as a result of their position. 12 C.F.R. § 545.121. The district court determined that some of the claims against the Home Savings directors could be characterized as negligence or strict liability claims that might entitle the Home Savings directors to indemnification. The court concluded that the RTC, as a receiver of Home Savings, was a successor to Home Savings, 12 U.S.C. § 1821(d) (1988), and therefore, might be liable for indemnification of the directors, officers, or employees under 12 C.F.R. § 545.121. In addition, the RTC

[7] Whether the assertion of such defenses is strategically wise is not for us to decide. We merely keep the avenues open to permit the RTC to assert whatever defenses it wishes.

concedes that the claims are not frivolous, the Kansas court did not strike the third-party claims as KPERS requested in its motion to strike or alternatively sever the third-party claims, and the parties submitted lengthy briefs with opposing arguments regarding the merits of the claim and the Home Savings directors' ability to collect on a judgment. Under these circumstances, we cannot say the third-party claims are "so patently without merit as to justify . . . the court's dismissal for want of jurisdiction." *Bell*, 327 U.S. at 683; *Hagans*, 415 U.S. at 542-43. The RTC may, if it deems appropriate, request dismissal of either or both claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, or move for summary judgment. The outcome of these motions,[8] however, would not defeat the district court's jurisdiction as each is considered a ruling on the merits. *See Bell*, 327 U.S. at 682-83.

Accordingly, we affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

[8] We express no opinion regarding the merits of the claims or the ability of the claims to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Hagans*, 415 U.S. at 542 n.10.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1794WMKC

Kansas Public Employees Retirement System,

Appellant,

vs.

Reimer & Koger Associates, Inc., etc., et al.,

Appellees.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

October 12, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

App. 20

[Dated February 17, 1993]

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 92-0922-CV-W-9

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff,

v.

REIMER & KOGER ASSOCIATES, INC., et al.,
Defendants,

FRANK MORGAN, et al.,
Defendants and Third-Party Plaintiffs,

v.

RESOLUTION TRUST CORPORATION,
Third-Party Defendant.

ORDER DENYING MOTION TO REMAND
AND CERTIFICATION
PURSUANT TO 28 U.S.C. § 1292(b)

Plaintiff moves to remand this case to the District Court of Shawnee County, Kansas. A hearing was held on February 11, 1993, with the parties presenting oral arguments on plaintiff's motion.

For the reasons stated on the record at the February 11, 1993, hearing, it is ORDERED that plaintiff's Motion to Remand is denied.

Because the state court had jurisdiction over the case when it entered the severance order, there is a substantial ground for difference of opinion as to whether this court has subject matter jurisdiction over the entire case. An immediate appeal from this order may materially advance the ultimate termination of the litigation. If it is determined on interlocutory appeal that this court lacks subject matter jurisdiction over part of the case presently pending in this court, that part of the case can be remanded to the District Court of Shawnee County, Kansas, for further proceedings. However, if the Court of Appeals were to determine that this court lacks subject matter jurisdiction after the case has been fully litigated in this court, the parties will have wasted many months and a great deal of money litigating in a court with no power to decide a significant portion of the dispute.

Pursuant to 28 U.S.C. § 1292(b), the order denying plaintiff's motion to remand involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/ D. Brook Bartlett
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
February 17, 1993.

SUPREME COURT OF THE UNITED STATES

No. A-511

Kansas Public Employees Retirement System,
Petitioner

v.

Reimer & Koger Associates, Inc., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including 9 February, 1994.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 22nd day of December, 1993.

Supreme Court, U.S.
FILED
MAR 15 1994
OFFICE OF THE CLERK

No. 93-1307

In The

Supreme Court of the United States

October Term, 1993

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., et al.,

Respondents,

v.

RESOLUTION TRUST CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MORGAN, DREISESZUN, GERHART, OZAR, GIFFORD, JONAS, KIENE, NAY, SALAZAR, AND PISTILLI

ROBERT J. CAMPBELL
JAMES E. KELLEY, JR.
LEWIS, RICE & FINGERSH
1010 Walnut Street,
Suite 500
Kansas City, MO 64106
(816) 421-2500

CHARLES W. GERMAN*
BRANT M. LAUE
ROUSE, HENDRICKS, GERMAN,
MAY & SHANK, P.C.
1010 Walnut Street,
Suite 400
Kansas City, MO 64106
(816) 471-7700

*Counsel of Record

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26pp

QUESTIONS PRESENTED

1. Whether the Resolution Trust Corporation as a third party defendant may remove the entire action to federal court pursuant to 12 U.S.C. § 1441a(*l*).

2. Whether an *ex parte* state court order purporting to sever a third party action from the original action for the express purpose of trying to prevent removal by the Resolution Trust Corporation pursuant to 12 U.S.C. § 1441a(*l*) is inconsistent with the Supremacy Clause.

3. Whether the third party action in this case so lacks any arguable basis in law or fact that it would be a frivolous basis for conferring federal jurisdiction pursuant to 12 U.S.C. § 1441a(*l*).

LIST OF PARTIES

Petitioner is the Kansas Public Employees Retirement System, the plaintiff and appellant below.

Respondents on this brief are Frank S. Morgan (deceased), Sherman Dreiseszun, Leland Gerhart, I.I. Ozar, Raymond Gifford, Harry S. Jonas, Ralph Kiene (deceased), Randall M. Nay, Tony Salazar, and Phillip M. Pistilli, all defendants, third party plaintiffs, and appellees below.

Other respondents include: Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, Clifford W. Shinski, Brent Messick, Robert Crew, Michael Russell, Gage & Tucker, Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, and Robert Spence, all defendants and appellees below; and the Resolution Trust Corporation, a third party defendant and appellee below.

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No. 93-1307

In The

Supreme Court of the United States

October Term, 1993

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., et al.,

Respondents,

v.

RESOLUTION TRUST CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MORGAN, DREISESZUN, GERHART, OZAR, GIFFORD, JONAS, KIENE, NAY, SALAZAR, AND PISTILLI

Respondents Morgan, Dreiseszun, Gerhart, Ozar, Gifford, Jonas, Kiene, Nay, Salazar, and Pistilli respectfully request that the Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's decision in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 4 F.3d 614 (8th Cir. 1993) and is included in the Appendix to the Petition at pp. 3-18. The order of the court of appeals denying rehearing is included in the Appendix to the Petition at p. 19. The decision of the district court on the motion to remand is unreported and is included in the Appendix to the Petition at pp. 20-21. The *ex parte* severance order of the District Court of Shawnee County, Kansas, entered prior to removal, is unreported and is included in the Appendix to this Brief at pp. 1-2. The brief transcript of the *ex parte* proceedings in the state court, containing the court's reasoning for granting relief, is included in the Appendix to this Brief at pp. 3-5.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1993. Rehearing was denied on October 12, 1993. Petitioner obtained an extension of time to file its Petition until February 9, 1994, and the Petition was filed on February 9, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was based upon 28 U.S.C. § 1292(b), and in the district court upon 12 U.S.C. § 1441a(*l*).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

12 U.S.C. § 1441a(*l*) provides, in pertinent part:

(1) In general

Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

* * *

(3) Removal and remand

(A) In general

The Corporation, in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the Corporation has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the Corporation as conservator or receiver of such institution.

Article VI, clause 2 of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

A. Factual Background

This is an investment fraud case alleging common law fraud, various tort theories, and violations of the Kansas Securities Act in connection with Petitioner the Kansas Public Employees Retirement Systems' ("KPERS") $65 million investment in high yield debt securities issued in 1986 and 1987 by Home Savings Association of Kansas City, Missouri, N.A. ("HSA"), a savings and loan association placed in receivership in March 1991. The Resolution Trust Corporation ("RTC"), a federal agency pursuant to 12 U.S.C. § 1441a(b), was appointed receiver for HSA. The Respondents here (the "HSA defendants") were all members of the HSA board of directors. The other Respondents are KPERS' investment advisors (Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth H. Koger, and others), attorneys (Gage & Tucker), accountants (Peat, Marwick, Mitchell & Co., KPMG Peat Marwick, and Robert Spence), and a former KPERS trustee (Michael Russell).

On October 2, 1992, the HSA defendants filed in state court a third party petition in two counts against the RTC. Count I alleged that HSA had a net worth of at least $22 million as of the date of its seizure and control by the

RTC, which should have been available for distribution to KPERS as the institution's sole priority shareholder, that there was post-seizure negligence of RTC which dissipated that net worth and that, accordingly, pursuant to principles of comparative implied contribution and indemnity under Kansas law, at least $22 million of KPERS' loss was the responsibility of the RTC, not the HSA defendants (if they are liable to KPERS on negligence or strict liability bases, as KPERS claims). Count II alleged that the HSA defendants were entitled to indemnification under a specific federal regulation, 12 C.F.R. § 545.121, applicable to KPERS' claims for defendants' conduct as directors of HSA.

The filing of this third party petition set in motion a bizarre and unbecoming chain of events that culminated in the state court – already with a history of disfavoring any action which could lead to removal by RTC[1] –

---

[1] A pivotal legal issue throughout the life of this case has been the question whether KPERS is actually asserting derivative claims of corporate mismanagement, which belong to the institution's successor, RTC. Significantly, KPERS has never alleged that the securities it purchased in 1986 and 1987 were not worth the price paid; the securities were never in default until after the RTC receivership was imposed, and KPERS was timely paid all interest due pre-seizure, nearly $30 million. Thus, the HSA defendants have contended that KPERS has alleged damages only from the government's seizure of HSA in 1991, and not from any of the alleged fraud at the time of investment in 1986. The HSA defendants raised this issue in a motion to dismiss filed in state court before removal and in a pending summary judgment motion filed in the federal district court after removal. The state court denied the motion to dismiss, and attempted in vain to cure KPERS' derivative suit problems by striking certain of the derivative suit allegations

entering an *ex parte* order purporting to sever the third party action from the original case on the pretext of the existence of an emergency. According to representations in court filings (including an affidavit of KPERS' counsel) and in oral argument, as well as a state court transcript, Resp. App. at 3, this *ex parte* procedure was a purposeful effort by KPERS and the state court calculated to obstruct RTC's federal law right to remove the entire action.

On October 8, 1992, at approximately 4:00 p.m., KPERS contacted the state court clerk regarding the filing of a motion to strike or sever the HSA defendants' third party petition. The state court clerk advised that an employee would remain in the office after the normal 5:00 p.m. closing time to permit filing of the pleadings. KPERS also contacted the chambers of the state court judge handling the case to advise that it "desired to present a matter to the court for his *ex parte* consideration, that day." Subsequently, at 5:26 p.m., KPERS appeared before

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from plaintiff's petition. The RTC also had raised the derivative claims issue in a motion to intervene filed in state court, and RTC renewed that motion in federal court after removal. This should have been a routine procedural matter, as the RTC had an absolute right to intervene under Kan. Stat. Ann. § 60-224(a) (the equivalent of Fed. R. Civ. P. 24(a)), but the state court without explanation failed to rule RTC's motion. RTC had candidly informed the court and the parties that once it was permitted to intervene it would remove the case to federal court for the purpose of seeking a ruling on the derivative nature of KPERS' claims. In retrospect, that prospect of removal was apparently why the state court would not rule.

the state court judge "to present [its] Motion and proposed *ex parte* Order."[2] At 5:42 p.m., the state court entered an *ex parte* order severing the third-party action from the original action. The only record of what occurred in the intervening sixteen minutes is a three-page transcript, which indicates that "[t]he Defendants appeared not." Resp. App. at 3.[3] The transcript reflects the following statement by the state court judge:

> [T]here's also been provided to the Court an order requesting that the, that the third party claim alleged, alleged third party claim of the Morgan defendants that I just named against the [RTC] be severed, and I do this on a ex parte basis.

Resp. App. at 4.

This entire chain of events occurred without any notice to any defendant in the case, although many were represented by counsel in the same city (Topeka, Kansas) or within an hour's drive of the court (in Kansas City). In the wake of this *ex parte* procedure, KPERS has admitted that it intended to have the state court consider the matter *ex parte*, notwithstanding the fact that it could easily have given notice of its motion.

The state court explained the basis for its *ex parte* action as follows:

> The Court is familiar with the history of this case, feels that under the circumstances the

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[2] These quotations and other facts in this paragraph are from an affidavit of KPERS' counsel submitted to the district court.

[3] The transcript is included in the Appendix to this Brief.

> addition of the [RTC] in another, by the third party petition would subject this case to removal under the federal statutes and in which case until the motion to dismiss would be argued, testing the substance of that claim the Court would not feel that the, to maintain them in the same case and subjecting this case to removal would be in the best interest of the advancement of the principle case.

Resp. App. at 4-5. As KPERS' counsel conceded at the district court hearing on KPERS' motion to remand, and the state court transcript makes clear, the reason the state court judge entered the *ex parte* severance was to prevent RTC from removing the case.[4]

---

[4] The state court's *ex parte* order was entered on the pretext that there was an emergency. The emergency consisted solely of KPERS' desire to do something quickly to prevent RTC from removing the entire case to federal court, a right which it unquestionably had under 12 U.S.C. § 1441a(*l*), as shown by the following colloquy between the federal district court and KPERS' counsel:

> THE COURT: And there was an emergency.
>
> MR. DEACY: It was an emergency.
>
> THE COURT: What was the emergency?
>
> MR. DEACY: The emergency was that so long as the case was one case, the RTC could remove it all.
>
> THE COURT: And they could – had the right under federal law to do so.
>
> MR. DEACY: They had the right under federal law so long as they were a party to the case.
>
> THE COURT: Right. And so the emergency was to do something quickly to attempt to prevent the RTC from removing the case?
>
> MR. DEACY: That's right, Your Honor.

RTC removed the entire action on October 13, 1992, pursuant to 12 U.S.C. § 1441a(*l*), which confers federal court jurisdiction over "any civil action, suit, or proceeding to which the [RTC] is a party." KPERS moved to remand, and the federal district court denied the motion. The Eighth Circuit accepted an interlocutory appeal and affirmed.

B. The District Court and Court of Appeals Decisions

The federal district court decision was entered in a written order, Pet. App. at 20-21, that referred to the reasoning stated by the court on the record at a hearing. At the hearing, the district court indicated that the state court order severing the third party action from the original action – the sole basis for KPERS' remand motion – was void because it violated the Supremacy Clause. As the district court found, "there was no valid excuse for the order that the state court entered because the reason is the very reason prohibited by the Supremacy Clause." The court went on to conclude: "Under these circumstances, the attempt to sever a case into two cases for the sole purpose of defeating a right conferred by Congress on the RTC to remove any case in which it was a party is void because it violates the Supremacy Clause in Article VI, Clause 2 of the United States Constitution."

The court of appeals affirmed in a unanimous decision, finding that "[o]n its face the Kansas court's order violates the Supremacy Clause." Pet. App. at 13. The court noted that "the federal courts should not condone a procedure intended to prevent removal when a party has the right to remove," and found that "Congress gave the

RTC a broad right to remove any action." *Id.* at 12. Accordingly, "once the Home Savings directors brought the RTC into the action as a third-party defendant, the RTC became inextricably involved in the entire action," and the purported severance by the state court did not "exclude the third-party defendant from participation in the original action nor deprive it of its ability to exercise its congressionally conferred right to remove the entire case to federal court." *Id.* at 14-15. The court of appeals also rejected KPERS' fact-based assertions that the third party action was frivolous, finding that the arguments did not merit consideration at length. *Id.* at 17. Rehearing was denied without dissent or comment. Pet. App. at 19.

REASONS FOR DENYING THE WRIT

1. The Petition does not present any issue as to which there is a conflict of decisions or which constitutes an important or substantial question of federal law. The Petition itself does not contend that there is a conflict or an important question at issue. Instead, the Petition raises fact-based issues concerning the third party action and issues that were not reached or decided by the court of appeals or the district court, and contends that the court of appeals ignored its own precedents. These matters are not well-suited for review on a writ of certiorari. The court of appeals' decision on this interlocutory appeal does not merit further review.

2. As to the first question presented by both Petitioner and these Respondents for review, the law is uniform and well-settled that the scope of 12 U.S.C.

§ 1441a(*l*), which is the RTC removal provision, includes the principal action when the RTC is named as a third party defendant. Pet. App. at 11; *California v. Keating*, 986 F.2d 346 (9th Cir. 1993) (addition of RTC as third party defendant transforms entire action into one that arises under federal law and RTC may remove).

In *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992), the court interpreted a similar "special" removal statute, including a provision for removal of "any civil action," which is the same statutory phrase Congress used in 12 U.S.C. § 1441a(*l*). The court found:

> The use of the words "civil action" are synonymous with the concept of an entire case when those words are not otherwise limited by accompanying language, a companion statute, or legislative history. As the rules of federal practice make clear, a civil action is an entire civil case, encompassing claims filed by plaintiffs and claims filed by third-party plaintiffs.

974 F.2d at 1260 (citation omitted); *see also Nolan v. The Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991). The court of appeals noted that KPERS did not disagree with this analysis on the interlocutory appeal. Pet. App. at 11. Accordingly, issuance of a writ of certiorari on the first question would be inappropriate because there is no conflict of decisions or important issue and the question was not placed in issue below.

3. As to the second question presented by both Petitioner and these Respondents for review, Petitioner does not challenge the court of appeals' core holding that a state court decision entered solely to obstruct a federal statutory right to remove an action is unconstitutional

under the Supremacy Clause. The Supremacy Clause makes the Constitution and laws passed pursuant to it "the Supreme Law of the Land," U.S. Const., art. VI, cl. 2, and "charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990). Moreover, "[t]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.* at 371.

The court of appeals found that it is "well established that states cannot directly or indirectly prevent, defeat, or limit the free exercise of the right to remove." Pet. App. at 12 (citing *Goldey v. Morning News*, 156 U.S. 518, 523 (1895)). As the district court found, the state court's *ex parte* severance order, entered "for the sole purpose of defeating a right conferred by Congress on the RTC to remove any case to which it was a party," was inconsistent with the Supremacy Clause. These central holdings of the courts below are not the subject of any conflict of decisions; although Petitioner seeks review of the court of appeals' ultimate decision under the Supremacy Clause, it does not challenge the reasoning or authority for the decision. Instead, the Petition raises issues concerning the uniformity of Eighth Circuit law, issues not addressed by the court of appeals, and issues not raised in the court of appeals.

4. a. The third question presented by these Respondents concerns the subject addressed at the greatest length in the Petition. The district court, citing *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 219 & n.7 (8th Cir. 1990), *vacated on other grounds*, 943 F.2d 860 (8th Cir. 1991),

found that the third party action against RTC could serve as a basis for conferring federal jurisdiction under 12 U.S.C. § 1441a(*l*) unless it is "specious and totally insubstantial" or "totally frivolous." The district court found that these Respondents' indemnity claim against RTC under 12 C.F.R. § 545.121 was not frivolous, and the court of appeals affirmed this finding. Pet. App. at 17-18. The Petition seeks review of this finding on several grounds, none of which merit the issuance of a writ.[5]

b. First, Petitioner contends that there are no assets to satisfy a judgment for these Respondents on their third party action against RTC. The court of appeals, however, explicitly distinguished its prior precedents on this issue, thus leaving Petitioner to argue, as it did unsuccessfully on rehearing below, that the Eighth Circuit disregarded its own precedent. Moreover, there was no factual record in the district court concerning whether a judgment on the third party action could be satisfied, thus the issue was not ripe for substantive review.

c. Second, Petitioner takes issue with the court of appeals' holding that the third party claim under 12 C.F.R. § 545.121 is not "frivolous." The court of appeals,

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[5] As a preliminary matter, it is not clear that this "frivolousness test" is properly applied in the context of a special removal statute such as that invoked by the RTC here. Under 12 U.S.C. § 1441a(*l*), RTC would seem to have the right to a federal court determination of the merits of the claim against it, whether frivolous or simply non-meritorious. The court of appeals elected not to reach this point. Pet. App. at 16 n.6. Significantly, the district court and the court of appeals distinguished the "frivolousness" analysis from full consideration of a motion to dismiss. Pet. App. at 18 n.8.

indicating that the issue did not require consideration at length, found that the claim could not be categorized as "'so patently without merit as to justify . . . the court's dismissal for want of jurisdiction.' " Pet. App. at 18 (quoting *Bell v. Hood*, 327 U.S. 678, 683 (1946)). This preliminary finding of the viability of a claim on an interlocutory appeal hardly merits this Court's attention.[6]

d. Third, Petitioner contends that the third party action did not state a cause of action because of this Court's decision in *United States v. Gaubert*, 499 U.S. 315 (1991). Petitioner did not raise this point, however, in any court below, and thus it does not merit consideration here.

e. Fourth, Petitioner contends that there is no Article III "case or controversy" because a judgment in the third party action would not be collectible. This constitutional argument was not addressed by either of the courts below and is an offshoot of the point discussed at 4.b. above. Like the other issues raised by Petitioner, it requires a factual inquiry and was not developed in the prior proceedings. The issue does not justify an exercise of this Court's discretionary review.

---

[6] Indeed, motions to dismiss on this very issue are now pending in the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. CAMPBELL
JAMES E. KELLEY, JR.
LEWIS, RICE & FINGERSH
1010 Walnut Street,
Suite 500
Kansas City, MO 64106
(816) 421-2500

CHARLES W. GERMAN*
BRANT M. LAUE
ROUSE, HENDRICKS, GERMAN,
MAY & SHANK, P.C.
1010 Walnut Street,
Suite 400
Kansas City, MO 64106
(816) 471-7700

*Counsel of Record

Counsel for Respondents

APPENDIX

IN THE DISTRICT COURT OF SHAWNEE COUNTY,
KANSAS DIVISION VII

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM Plaintiff, v. REIMER & KOGER ASSOCIATES, INC. et al., Defendants, FRANK MORGAN, et al., Defendants and Third-Party Plaintiffs, v. RESOLUTION TRUST CORPORATION, etc.	Case No. 91 CV 786 (Filed Oct. 9, 1992)

ORDER SEVERING MORGAN DEFENDANTS THIRD-PARTY PETITION AGAINST RESOLUTION TRUST CORPORATION

COMES NOW for consideration the motion of the plaintiff, Kansas Public Employees Retirement System, for an *ex parte* order severing the Morgan defendants third-party petition against the Resolution Trust Corporation.

The Court notes the recently filed Third-Party Petition by the Morgan defendants against the Resolution Trust Corporation (RTC) which seeks indemnification and/or contribution from RTC for the alleged negligence of RTC in managing the Home Savings Associations affairs since the association was placed in receivership in

March, 1991, and further seeks indemnification pursuant to the provisions of 12 C.F.R. § 545.121.

The Court also notes the Motion to Dismiss and Sever, filed by the plaintiff alleging that there is no nexus between the plaintiff's claim for damages, pursuant to fraud in the inducement of the KPERS investment in the former Home Savings Association, and the negligence and indemnification claims made by the Morgan defendants, as third-party plaintiffs, against RTC.

Without deciding the plaintiff's Motion to Dismiss, the Court hereby grants plaintiff's *ex parte* Motion for Severance, pursuant to the provisions of K.S.A. 60-221, and directs that the Clerk of the District Court assign Case No. 91 CV 786A to the third-party petition, filed by the Morgan defendants herein, against the Resolution Trust Corporation.

Counsel for the plaintiffs is hereby directed to notify all counsel of record, including the RTC, of this Order of Severance. Any party who claims to be aggrieved by this *ex parte* Order of Severance, may file a Motion for Reconsideration, which will be scheduled for immediate hearing, along with the plaintiff's Motion to Dismiss.

Entered this 8th day of October, 1992, at Topeka, Kansas.

/s/ Franklin R. Theis
Franklin R. Theis
District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY,
KANSAS DIVISION SEVEN

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, ---------- Plaintiff,	)	
vs	)	Case No.
REIMER & KOGER ASSOCIATES, INC.,	)	91 CV 786
vs	)	
---------- Defendants,	)	
vs	)	
FRANK MORGAN, et al., ---------- Defendants & Third-Party Plaintiffs,	)	
vs	)	
RESOLUTION TRUST CORPORATION, et al., ---------- Third-Party Defendants.	)	

HEARING

(Proceedings Had on October 8, 1992)

Before

THE HONORABLE FRANKLIN R. THEIS

JUDGE

APPEARANCES:

The Plaintiffs appeared by and through their counsel, Schroer, Rice, P.A., 115 East 7th Street, Topeka, Kansas, 66603, by Mr. Charles D. McAtee.

The Defendants appeared not.

THE COURT: This is the Kansas Public Employees Retirement System versus Reimer and Koger, Inc., et al., 91 CV 786, and you want to state your appearance?

MR. MCATEE: Charles McAtee on behalf of the plaintiffs, Kansas Public Employees Retirement System, Your Honor.

THE COURT: All right. At the conclusion of the hearing – we just had a hearing in the Corder versus Board of Healing Arts, and Mr. McAtee came in and – because the clerk's office is closed. No one is available to receive pleadings, filed with the Court as of 5:26, which the Court has noted on the filings, a Motion of Plaintiff, of Kansas Public Employees Retirement System to Strike the Third Party Petition Filed herein by Frank Morgan, Sherman Dreiseszun, Leland Gerhart, I. I. Ozar, Raymond Gifford, Ralph E. Kiene, Randall M. Nay, Tony Salazar and Phillip Pistilli, or in the Alternative, to Sever the Claims as Set Forth in Such Parties' Third Party Petition from the Remaining Lawsuit of the Plaintiff. Additionally a copy of the, of the Third Party Complaint that was served on the, a copy which was served on the plaintiff has been provided to the Court, and there's also been provided to the Court an order requesting that the, that the third party claim alleged, alleged third party claim of the Morgan defendants that I just named against the Resolution Trust Corporation be severed, and I do this on a ex parte basis. I read the third party claim. The Court is familiar with the history of this case, feels that under the circumstances the addition of the Resolution Trust Corporation in another, by the third party petition would subject this case to removal under the federal statutes and in which case until the motion to dismiss would be argued,

testing the substance of that claim the Court would not feel that the, to maintain them in the same case and subjecting this case to removal would be in the best interest of the advancement of the principle case. And I would sign ex parte the order to sever and direct the plaintiff to notice the matter up for any hearing or objection that they might have, and schedule additionally the motion to dismiss and the Court would direct that this, that the third party claim be severed and it would be filed as a 91 CV 76A case as a separate case entirely from the previous 786 –

MR. MCATEE: 786A, I believe.

THE COURT: – 786, 91 – the original case is 91 CV 786 and the new case that would be created would be 91 CV 786A. And this order would be sent to the clerk, and it is entered today at – it would be now 5:42.

MR. MCATEE: Thank you, Your Honor. We will notice the motion to dismiss up promptly.

THE COURT: And I want you to notice them that the Court has entered a severance order and would be willing to, you know, for any – and the Court considers this matter on an emergency basis.

* * *

(3)

Supreme Court, U.S.
FILED
MAY 4 1994
CLERK

No. 93-1307

In the Supreme Court of the United States

OCTOBER TERM, 1993

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
PETITIONER

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ELLEN B. KULKA
General Counsel

JAMES M. BARKER
Acting Deputy General Counsel

MARK P. HILEMAN
Acting Assistant General Counsel

JEFFREY I. EHRLICH
Counsel
Resolution Trust Corporation
Washington, D.C. 20403

(2)

QUESTION PRESENTED

Whether the lower courts correctly rejected petitioner's argument that the Resolution Trust Corporation was not entitled to remove this case from state court under 12 U.S.C. 1441a because the claims against the Resolution Trust Corporation were frivolous for purposes of *Bell* v. *Hood*, 327 U.S. 678 (1946).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1307

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
PETITIONER

v.

REIMER & KOGER ASSOCIATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-18) is reported at 4 F.3d 614.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1993. A petition for rehearing was denied on October 12, 1993. Pet. App. 19. On December 22, 1993, Justice Blackmun granted an extension to and including February 9, 1994, of the time within which to file a petition for a writ of certiorari. Pet. App. 22. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March of 1991 the Resolution Trust Corporation (RTC) was appointed receiver for Home Savings Association. In June of 1991 petitioner Kansas Public Employees Retirement System filed suit in a state court in Kansas against petitioner's investment manager, seeking to recover losses on petitioner's investment of $65 million in debentures issued by Home Savings. In December of 1991 petitioner amended its complaint to assert causes of action against a variety of additional parties, including former officers and directors of Home Savings (the Morgan respondents).[1] Those causes of action generally alleged that the Morgan respondents fraudulently had induced petitioner to invest in Home Savings. See Pet. App. 4-5; Pet. 5.

After the Morgan respondents unsuccessfully sought dismissal of the claims against them based on their view that any claims against them were held by the RTC as receiver of Home Savings, they filed a third-party petition against the RTC on October 2, 1992. That petition argued that any loss was caused by negligent mismanagement of Home Savings by the RTC in its corporate capacity, and alternatively argued that the Morgan respondents were entitled to indemnity from the RTC as receiver. See Pet. App. 5.

Late in the afternoon of October 8, 1992, petitioner's counsel, without contacting counsel for the Morgan respondents or the RTC, arranged an ex parte hearing before the state judge handling the case. At that hearing petitioner's counsel sought an emergency order severing the third-party claims against the RTC from petitioner's

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[1] See Pet. 5 (referring to the former officers and directors of Home Savings as the Morgan defendants).

claims against the Morgan respondents. Counsel stated that if the judge did not sever the claims the RTC would be able to remove the entire case to federal court. The state judge thereupon issued an order severing the third-party claims against the RTC from petitioner's claims against the Morgan respondents. Morgan Resp. App. 1-2 (order of state court); see Pet. App. 5-7.

2. Five days later, the RTC filed a notice removing the entire case to the United States District Court for the Western District of Missouri (the district containing the principal place of business of Home Savings) under 12 U.S.C. 1441a (Supp. IV 1992). Petitioner urged the district court to remand the "original case" to the state court, arguing that the state court's severance order had created two separate cases, and that the RTC was not a party to the case brought by petitioner against the Morgan respondents. The district court held a hearing, at which petitioner's counsel acknowledged that the state court had severed the cases solely to prevent removal by the RTC. The district court then concluded that "the attempt to sever a case into two cases for the sole purpose of defeating a right conferred by Congress on the RTC to remove any case in which it was a party is void because it violates the Supremacy Clause in Article VI, Clause 2 of the United States Constitution." Pet. C.A. App. A4; see Pet. App. 6-8.

The court also rejected petitioner's claim that the Morgan respondents' claims against the RTC were so frivolous that they could not confer subject-matter jurisdiction on the federal district court. Pet. C.A. App. A6; see Pet. App. 7-9.

The district court certified the case for interlocutory appeal under 28 U.S.C. 1292(b). Pet. C.A. App. A1-A2; see Pet. App. 9.

3. The court of appeals affirmed. Pet. App. 3-18.

a. The principal issue addressed by the court of appeals was the question whether the district court properly concluded that the RTC was entitled to remove the entire case even though, before the RTC filed a notice of removal, the state court had issued an order purporting to sever petitioner's claims against the Morgan respondents from the claims against the RTC. Pet. App. 9-15. On that question, the court of appeals affirmed the district court for two alternative reasons. First, the court agreed with the district court's conclusion that the severance order was void, explaining that "the federal courts should not condone a procedure intended to prevent removal when a party has the right to remove." *Id.* at 11-13. Second, the court explained that removal of the entire case would have been proper even if the severance order were effective, because the RTC's interest as a third-party defendant would have entitled it under Kansas procedural rules to participate in the state-court proceedings regarding petitioner's claim against the Morgan respondents. In the view of the court of appeals, that entitlement to participate in the proceedings on petitioner's complaint gave the RTC a sufficient interest in that portion of the proceedings to justify its removal of that portion of the proceedings to federal court. *Id.* at 13-15 (citing *Nolan* v. *The Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991)).

b. The court of appeals also rejected petitioner's argument that the claims of the Morgan respondents against the RTC were so frivolous that they could not form a basis for federal jurisdiction. Pet. App. 15-18. The court explained that a claim could be dismissed for want of jurisdiction as frivolous only if it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly

insubstantial and frivolous." *Id.* at 15 (quoting *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946)). The court then reviewed both of the claims brought by the Morgan respondents against the RTC and concluded that neither of them was "so patently without merit as to justify . . . the court's dismissal for want of jurisdiction." Pet. App. 18 (quoting *Bell*, 327 U.S. at 683).

ARGUMENT

Petitioner apparently no longer presses the main question decided by the court of appeals: whether the Supremacy Clause rendered void the state court's order severing the third-party claims against the RTC from petitioner's claim against the Morgan respondents. Rather, petitioner appears to limit its argument in this Court to the contention that removal was improper because the claims against the RTC were frivolous.[2] In our view, removal was proper even if the claims were frivolous. In any event, the factbound question whether the claims at issue here were frivolous does not warrant review by this Court.

1. At the outset, petitioner's argument rests on the implicit premise that the rule articulated in *Bell* v. *Hood*, 327 U.S. 678 (1946)—which allows dismissal of a suit for want of subject-matter jurisdiction where the federal claims are frivolous—applies in cases where the federal court's jurisdiction is based on a party's status rather than the existence of a federal question.

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[2] Petitioner does argue (Pet. 16-17) that the state court's severance order did not violate the Supremacy Clause, but the basis for that argument is the contention that the claims against the RTC were frivolous. For the reasons explained in Point 2, *infra*, petitioner's challenge to the substantiality of the claims against the RTC does not warrant review.

That premise is incorrect. The doctrine of *Bell* is a limitation on federal subject-matter jurisdiction. It holds that "[n]ot every case arising under federal law is within federal question jurisdiction." 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3564, at 66 (2d ed. 1984) (internal quotation marks and footnotes omitted). The doctrine rests on the view that a plaintiff should not be able to manufacture federal jurisdiction over a case that otherwise would not be cognizable in federal court solely by including a wholly insubstantial claim based on federal law. See *Bell*, 327 U.S. at 682-683 (referring to a federal claim that "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction").

There is no basis for applying that doctrine in a case like this one, where federal jurisdiction rests not on the general federal question statute (28 U.S.C. 1331), but instead on a statutory grant of jurisdiction based on the presence of a specific party, in this case the RTC.[3] Because the requirements for federal jurisdiction in this case are entirely satisfied by the presence of the RTC—whether the claims the Morgan respondents have made against the RTC arise under federal law or state law—there is no reason to conclude that the federal court would lack jurisdiction over the case simply because the claims involved in the case are frivolous. Rather, the appropriate response to a determination that the claims

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[3] There can be no doubt that the federal question implicated by the federal creation of the RTC is sufficiently substantial to satisfy any constitutional threshold necessary for federal-question jurisdiction under the *Bell* doctrine, as demonstrated by the Court's recent reaffirmance of the permissibility of party-based jurisdictional grants in *American National Red Cross* v. *S.G.*, 112 S. Ct. 2465 (1992).

are frivolous would be dismissal of the claims on the merits.[4]

The impropriety of applying the *Bell* doctrine in cases involving party-based jurisdictional grants is evidenced by the tension between the effect of that doctrine and the purpose of party-based jurisdictional grants in giving certain federal entities the protection of a federal forum for adjudication of claims against them. It would make no sense to say that the RTC is entitled to a federal forum when plaintiffs present serious claims against it, but that it is remitted to a state forum for continuing litigation of claims that a federal court determines to be frivolous. Accordingly, removal was proper even if the claims against the RTC are frivolous.[5]

2. In any event, the court of appeals' determination that the claims were not sufficiently frivolous to justify dismissal even if the *Bell* doctrine applied does not warrant review by this Court. As this Court explained in *Hagans* v. *Lavine*, 415 U.S. 528 (1974), the threshold level of substance necessary for a claim to pass the *Bell* test is quite low. A claim is inadequate "only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Id.* at 538 (internal quotation marks omitted).

Whatever one thinks about the claims raised by the Morgan respondents—and the RTC believes that those

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[4] The RTC has filed motions in the district court seeking dismissal of the claims against it. See RTC C.A. Br. 13.

[5] The court of appeals noted the presentation of this argument by the Morgan respondents (Pet. App. 16 n.6), but had no occasion to reach it given its conclusion that the claims against the RTC were not frivolous.

claims are meritless—the RTC has not argued, and it would be difficult to conclude, that the claims are so plainly frivolous as to leave no room for the inference that they can be the subject of controversy. For example, although the RTC has rejected the Morgan respondents' claim for indemnity, petitioner's argument that the claim is frivolous (Pet. 11-12) does not identify any specific regulatory provision that indubitably bars the claim, or any controlling decision of this Court or the court of appeals addressing such a claim. Similarly, although petitioner argues (Pet. 12-13) that respondents could not recover on the indemnity claim because the receivership estate is insolvent, the lack of funds to repay all investors entirely does not necessarily establish the lack of funds to pay any amount whatsoever to unsecured claimants. Because the record does not establish that unsecured claimants (a category that would include the Morgan respondents if their claims had merit) would receive nothing on their claims against the receivership estate, petitioner errs in arguing that the indemnification claim cannot possibly succeed because of the estate's insolvency.

Similarly, petitioner argues (Pet. 13-14) that the claim for negligent mismanagement by the RTC is barred by this Court's decision in *United States* v. *Gaubert*, 499 U.S. 315 (1991). Although the RTC shares the view that the claim is meritless, the fact remains that application of the discretionary function exception to the Federal Tort Claims Act at issue in *Gaubert* is exceedingly fact-specific. Accordingly, the possibility of a discretionary-function defense does not render the negligence claim so frivolous that it would not support federal jurisdiction under *Hagans* and *Bell*.

The question whether the claims brought against the RTC by the Morgan respondents are wholly insubstan-

tial turns on a particularized evaluation of the claims. The court of appeals' performance of that evaluation does not raise a legal question of general significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ELLEN B. KULKA
General Counsel

JAMES M. BARKER
Acting Deputy General Counsel

MARK P. HILEMAN
Acting Assistant General Counsel

JEFFREY I. EHRLICH
Counsel
Resolution Trust Corporation

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